

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUZANNE MARK)	
Claimant)	
VS.)	
)	
FIDELITY BANK)	Docket No. 1,052,282
Respondent)	
AND)	
)	
ACCIDENT FUND NATIONAL INSURANCE)	
COMPANY and AMERICAN ZURICH)	
INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Claimant appealed the October 28, 2010, Order entered by Administrative Law Judge (ALJ) Thomas Klein. The trial Court continued the initial preliminary hearing in this matter on its own motion due to the lack of notice of the hearing to a second insurance carrier which may be on the coverage for the alleged date of accident. Claimant was instructed to notify the second insurance carrier. The ALJ stated, in the Order, that the hearing would then be rescheduled promptly.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier Accident Fund National Insurance Company (Accident Fund). Due to the retirement of Board Member Carol Foreman, Tom Arnhold was appointed to serve as a Board member pro tem in this matter.

ISSUES

This is a claim for accidental injuries alleged to have occurred in August 2009 and each working day thereafter.

Mr. Riedmiller and Mr. Hobbs appeared for a preliminary hearing in this matter on October 21, 2010. Mr. Hobbs announced that he represented respondent and Accident Fund, whose coverage ended on December 1, 2009, and that American Zurich Insurance Company (American Zurich) came on the risk for respondent after that date. The K-WC E-1, Application For Hearing, alleged a date of accident from August 2009 and every working day thereafter. At the hearing, Accident Fund objected to the hearing going forward as American Zurich was not present; Accident Fund maintained claimant had an increase or recurrence of her symptoms after November 2009 and American Zurich was the liable insurance carrier for claimant's benefits.

In the October 28, 2010, Order, ALJ Klein stated:

The Court continues this hearing on its own motion, over the objection of Claimant's counsel. A material part of Respondent Fidelity Bank and Accident Fund National is that another carrier, American Zurich[,] is on the risk after December 1, 2009. American Zurich was not specifically noticed for this preliminary hearing. Claimant is instructed to notify Zurich American [*sic*]. The Court will reschedule this hearing promptly.¹

Claimant contends ALJ Klein should have held a preliminary hearing that was properly noticed for respondent and Accident Fund and found that said carrier either had or did not have coverage. On that point, claimant argues:

This would in no way prejudice any other insurance carrier. It is claimant's contention that it is not her burden of proof or obligation to anticipate who all of the insurance carriers may be for a work related injury and make sure that they all get notice of preliminary hearing. If claimant is confident that an insurance carrier is responsible for workers compensation benefits and properly gives notice to that insurance carrier and her employer of a preliminary hearing, then there is nothing in the Worker's Compensation Act that prevents claimant from having a preliminary hearing and claimant would suggest that denying claimant such . . . is a denial of due process.²

Claimant requests the Appeals Board (Board) reverse the October 28, 2010, Order.

Accident Fund contends this appeal is improper, ALJ Klein did not exceed his jurisdiction by disallowing the preliminary hearing to go forward and by requiring claimant to provide proper notice to all parties, and the Board has no subject matter jurisdiction to

¹ Order (Oct. 28, 2010).

² Claimant's Brief at 2 (filed Dec. 3, 2010).

consider claimant's arguments. Should the Board determine it has jurisdiction, Accident Fund requests the Board affirm the ALJ's Order. Accident Fund maintains ALJ Klein correctly identified American Zurich as a named party in the proceedings and determined claimant had failed to properly provide notice to American Zurich of the October 2010 preliminary hearing. Accident Fund contends American Zurich should be found to be ultimately responsible for the payment of benefits and as American Zurich's substantive legal rights are implicated, it is entitled to notice of the preliminary hearing.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review this appeal?
2. If so, did claimant provide proper notice of the October 2010 preliminary hearing to American Zurich Insurance Company?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, this Appeals Board Member finds and concludes that the Order remains in full force and effect and this appeal is dismissed.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?³

³ K.S.A. 44-534a(a)(2).

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.⁴

This matter came before the ALJ after notice of a preliminary hearing had been issued. The ALJ determined that an insurance company with potential liability had not been provided proper notice of the hearing. The ALJ then refused to allow the preliminary hearing to proceed and ordered claimant to provide notice to the absent insurance company, after which the preliminary hearing would be rescheduled.

The management of a docket is the responsibility of an administrative law judge. Here, the ALJ determined that not all necessary entities were present for the preliminary hearing. Whether that determination was correct or in error matters not at this point in these proceedings. It is within the jurisdiction and authority and the responsibility of the administrative law judge to make those determinations as he or she manages the docket.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁵

Here, the ALJ made what he thought was a necessary determination in continuing the docket to a future date and ordering notice be provided to another insurance company. That decision, right or wrong, is the responsibility of the ALJ. While this Appeals Board Member understands the frustration of the parties in these situations, nevertheless, it is not within the Board's jurisdiction to address these frustrations at this time.

WHEREFORE, this Appeals Board Member finds that the October 28, 2010, Order entered by Administrative Law Judge Thomas Klein remains in full force and effect and the appeal by claimant from the preliminary hearing Order of October 28, 2010, should be and is hereby dismissed.

⁴ K.S.A. 2009 Supp. 44-551(2)(A).

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

IT IS SO ORDERED.

Dated this ____ day of February, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller , Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and Accident Fund
American Zurich Insurance Company, PO Box 66946, Chicago, IL 60666-6946
Thomas Klein, Administrative Law Judge